

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

CC:LM:CTM:LA:2:POSTF167680-01  
KHAnkeny

date: December 18, 2001

to: Gwendolyn Hogans, Examination (LMSB)

from: Kate Ankeny, Attorney (LMSB)

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subject: Form 872 for [REDACTED] Corporation and Subsidiaries

This memorandum responds to your request for assistance, dated December 14, 2001. This memorandum should not be cited as precedent.

**ISSUE**

What is the proper wording for the Consent to Extend the Period of Limitations, Form 872, for the consolidated income tax liability of [REDACTED] Corporation and its subsidiaries for the tax year ending [REDACTED]?

**CONCLUSION**

The taxpayer and corporate signatory should be [REDACTED] Corporation, as successor in interest to [REDACTED] Corporation, for the tax year ending [REDACTED].

**FACTS**

[REDACTED] Corporation filed a consolidated income tax return, Form 1120, for itself and its subsidiaries for the short tax year ending [REDACTED].

On [REDACTED], [REDACTED] Corporation merged into [REDACTED] Corporation. [REDACTED] Corporation was the surviving corporation. You confirmed that: (1) [REDACTED] Corporation no longer exists; (2) [REDACTED] Corporation merged into [REDACTED] Corporation, not into a subsidiary of [REDACTED] Corporation; and (3) the [REDACTED].

On [REDACTED], [REDACTED] Corporation spun off all of its gaming subsidiaries, which included the former [REDACTED] Corporation's subsidiaries. [REDACTED] Corporation, which was a newly formed corporation, became the parent company for those gaming subsidiaries.

Examination gave [REDACTED] Corporation a Form 872 to sign. Examination's Form 872 identified the taxpayer as [REDACTED] Corporation. It listed [REDACTED] Corporation's EIN, [REDACTED]. It identified the tax year as ending December 31, [REDACTED]. It identified the corporate signatory as [REDACTED] Corporation & Subsidiaries.

On [REDACTED], an Executive Vice President on behalf of [REDACTED] Corporation signed and returned a different Form 872 to Examination. On its Form 872, [REDACTED] Corporation identified the taxpayer as [REDACTED] Corporation Successor to [REDACTED] Corporation & Subsidiaries. It listed [REDACTED] Corporation's EIN. It identified the tax year as ending December 31, [REDACTED]. It identified the corporate signatory as [REDACTED] Corporation. You believe that [REDACTED] Corporation was identified as a successor because [REDACTED] Corporation was a party to a tax-sharing agreement with [REDACTED] Corporation.

You confirmed that [REDACTED] Corporation still exists.

#### ANALYSIS

Generally, the common parent is the exclusive agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having also been given or executed by each such subsidiary. Id.

However, [REDACTED] Corporation cannot be the exclusive agent under Treas. Reg. § 1.1502-77(a) because it is no longer the common parent. On [REDACTED], when it merged into [REDACTED] Corporation, [REDACTED] Corporation ceased to exist.

Temp. Reg. § 1.1502-77T, which was promulgated in 1988 to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a). When a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group for

purposes of mailing notices of deficiency and for executing waivers of the period of limitations. Under Temp. Reg. § 1.1502-77T(a)(4), any one or more of the following corporations may act as alternative agents for the group:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies,

(ii) A successor to the former common parent in a transaction to which § 381(a) applies,

(iii) The agent designated by the group under section 1.1502-77(d), or

(iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Section 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. § 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. § 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. § 1.1502-77T.

Subparagraph (i) does not apply because [REDACTED] Corporation no longer exists.

However, subparagraph (ii) does apply. Subparagraph (ii) provides that a successor to the former common parent in a transaction to which section 381(a) applies is an alternative agent. Section 381(a)(2) concerns a transfer in connection with a reorganization described in section 368(a)(1)(A), (C), (D), (F), or (G). You confirmed that the merger was a section 368 reorganization. But, you did not know under which subparagraph of section 368(a)(1) the merger qualified. According to [REDACTED] Corporation's Form 10-K, [REDACTED] Corporation issued

and Convertible Preferred Stock as well as its common stock to [REDACTED] Corporation's shareholders. Thus, we assume the merger was a statutory merger under section 368(a)(1)(A), not an acquisition under section 368(a)(1)(C). Regardless, [REDACTED] Corporation is a successor to [REDACTED] Corporation in a transaction to which section 381(a) applies. On its Form 872, [REDACTED] Corporation incorrectly identified itself as the successor to [REDACTED] Corporation. [REDACTED] Corporation cannot be the successor to [REDACTED] Corporation because [REDACTED] Corporation still exists. Their tax-sharing agreement is irrelevant.

Subparagraph (iii) does not apply. It provides that the agent designated by the group under Treas. Reg. § 1.1502-77(d) is an alternative agent. It is inapplicable because [REDACTED] Corporation did not dissolve or contemplate dissolution, contrary to the requirement of Treas. Reg. § 1.1502-77(d).

Finally, subparagraph (iv) does not apply. According to subparagraph (iv), if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), then the common parent of the group at the time the waiver is given is an alternative agent. Section 1.1502-75(d)(2) concerns a common parent that ceases to exist following a mere change in identity or a transfer of assets to a subsidiary. When it transferred its gaming subsidiaries to [REDACTED] Corporation, [REDACTED] Corporation did not cease to exist. Section 1.1502-75(d)(3) concerns a reverse acquisition, which means that the shareholders of the acquired corporation receive more than 50% of the stock of the acquiring corporation. Given the relatively large size of the [REDACTED] Corporation consolidated group compared to the [REDACTED] Corporation consolidated group, you confirmed that [REDACTED] Corporation's merger into [REDACTED] Corporation was not a reverse acquisition.

In summary, [REDACTED] Corporation is a successor and is an "alternative agent" under subparagraph (ii) of Temp. Reg. § 1.1502-77T(a)(4). Therefore, [REDACTED] Corporation is authorized to sign a Form 872 on behalf of the [REDACTED] Corporation consolidated group for the tax year ending [REDACTED].

On the Form 872, you should identify the taxpayer as:

[REDACTED] Corporation (EIN [REDACTED]), as successor in interest to [REDACTED] Corporation (EIN [REDACTED]) \*

\* This is with respect to [REDACTED] Corporation and Subsidiaries consolidated group for the taxable year ending [REDACTED].

You should list [REDACTED] Corporation's EIN as the "Taxpayer's Identification Number." On its Form 872, [REDACTED] Corporation incorrectly listed [REDACTED] Corporation's EIN as the "Taxpayer's Identification Number."

You should identify the corporate signatory as:

[REDACTED] Corporation, which is successor in interest to [REDACTED] Corporation.

A current officer of [REDACTED] Corporation should sign the Form 872.

In addition, you should state that the tax year ended [REDACTED]. On its Form 872, [REDACTED] Corporation incorrectly stated that the tax year ended [REDACTED].

Finally, when you ask [REDACTED] Corporation to sign the Form 872, we recommend that you use Form Letter 907 (DO) (Rev. 2-2000). This letter summarizes a taxpayer's right to refuse to sign a consent or to limit a consent. Section 6501(c)(4)(B) requires that "[t]he Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent."

This memorandum may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

In accordance with CCDM(35)3(19)4, we are giving a copy of this memorandum to the National Office for its review. When we hear from the National Office, we will let you know whether the National Office agrees with this memorandum. Please call me (213.890.3027, ext. 155) if you have any questions.

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By: \_\_\_\_\_  
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[REDACTED]